FILE COPY

Supreme Court, U.S.
FILED
OCT 4 1972
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-547

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Petitioners,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO—CLC, ANTHONY MAKRIS, as President of Said Local 1470 and WESTERN ELECTRIC COMPANY, INC., (KEARNEY WORKS),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GODFREY P. SCHMIDT,
Counsel for Petitioners,
786 Broad Street,
Newark, New Jersey, 07102.

GROSMAN & GROSMAN,
786 Broad Street,
Newark, New Jersey 07102

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented	2
Statutory Provisions Involved	3
Statement of the Case	5
A. Preliminary Note	5
B. Statement of Facts	6
Reasons for Granting the Writ	7
Appendix:	
Complaint	1a
Opinion of United States District Court, District of New Jersey	8a
Final Judgment of Said District Court	17a
Opinion of the United States Court of Appeals for the Third Circuit	19a

Cases Cited

Czosek v. O'Mara, 397 U. S. 25, 90 S. Ct. 770 (1970)	13
Local Union No. 12 v. N.L.R.B., 368 F. 2d 12 (1966)	9
Miranda Fuel Co., 140 N.L.R.B. 181, 326 F. 2d 172 (1963)	12
Motor Coach Employees v. Lockridge, 403 U. S. 274 (1971)	12

PAGE

Steele v. Louisville & Nashville Railroad Co., 323 U. S. 192 10

Tunstall v. Brotherhood, 323 U. S. 210 10

Vaca v. Sipes, 387 U. S. 171 ..... 2, 7, 11, 12

Wallace Corporation v. NLRB, 323 U. S. 248 (1944) 12

Statutes Cited

Labor Management Relations Act, 1947, as amended:

Sec. 9(a) 4, 9

Sec. 301 ..... 2-4, 6, 9, 12

Railway Labor Act:

Sec. 1 10

Sec. 6 10

28 U.S.C.:

Sec. 1254(i) 2

29 U.S.C.:

Sec. 185 ..... 3, 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Petitioners,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO—CLC, ANTHONY MAKRIS, as President of Said Local 1470 and WESTERN ELECTRIC COMPANY, INC., (KEARNEY WORKS),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding July 7, 1972.

Opinion Below

Th opinion of the Court of Appeals (—— F. 2d ——) appears in the Appendix hereto; as does the opinion of the United States District Court for the District of New Jersey (—— F. Supp. ——). Neither is yet reported.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was entered on July 7, 1972. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(i).

Questions Presented

1. Whether, under *Vaca* v. *Sipes* (387 U. S. 171), it was sufficient to allege in the complaint herein violation by the respondent Union, in combination or conspiracy with respondent Employer, of its "statutory duty fairly to represent * * * [petitioning] employees * * * in its collective bargaining", considered as a process prior to, but resulting in, the labor contracts (which compounded that unfair representation) involved in this case?

2. Whether petitioners may use, as a basis for their complaint under Sec. 301 LMRA against the defendant Union and the defendant Employer, the *enforcement* of unfair contracts (*i.e.* labor contracts which on their face reveal unfair representation by the Union *in combination or conspiracy with the Employer* and which were the products of prior unfair representation by the Union, aided by the Employer, during the collective bargaining process)?

3. Whether the preliminary oral, written or implied agreements of recognition which preceded all collective bargaining by Union and Employer were necessarily *breached* by both parties, for the purposes of Sec. 301 LMRA, where the Union engaged in unfair representation of plaintiffs and their class, with the Employer's collaboration, during collective bargaining and in the resultant labor contract?

4. On the assumption that, under Sec. 301 LMRA, breach of contract is essential for a valid complaint (against Union and Employer) alleging unfair representation by the Union in combination or conspiracy with the Employer, did the complaint here sufficiently, if impliedly, allege such breach, since the explicitly alleged unfair representation by the Union in combination with the Employer necessarily implies breach by the contracting parties of their initial recognition agreement (whether written or oral) and their formal, written "Recognition" agreement reading: "Company recognizes the Union as the exclusive representative of the employees"?

5. On the assumption that an express allegation of breach of contract is essential for a complaint under Sec. 301 LMRA, should the Courts below have allowed petitioners to amend their complaint to enable them to allege, *as such breach,* violation by the Union with the Employer's collaboration, of the initial or preliminary recognition agreements and of the eventual formal "Recognition" clauses in the involved labor contrats?

Statutory Provision Involved

1. Section 301, Labor Management Relations Act, 1947, as amended (29 U.S.C. § 185):

TITLE III

Suits by and Against Labor Organizations

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

2. Section 9(a), LMRA:

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individ-

ual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

Statement of the Case

A. Preliminary Note

Petitioners appealed to the Third Circuit from a judgment of the United States District Court for the District of New Jersey dismissing their complaint and entering final judgment in favor of defendants pursuant to separate motions to dismiss the complaint made by defendants (1) Western Electric Company, Incorporated ("Western"), and (2) Local 1470, I.B.E.W., AFL-CIO-CLC (the "Union"), and Anthony Makris, president of the Union.

In the Court of Appeals, respondents sought affirmance of the judgment of the United States District Court basically on the grounds that (1) the court lacked jurisdiction over the subject matter of the complaint and (2) the complaint failed to state a claim upon which relief can be granted. They also took the position that petitioners should not be permitted to amend their complaint to allege breach of the recognition clauses involved; and that, in any event, such allegation would be of no avail to plaintiffs.

B. Statement of Facts

This is a class action brought by six individuals, members of the Union. Plaintiffs represent a class of employees of Western called "Testers-Inspectors". Said employees are in the collective bargaining unit represented by the Union. A copy of the involved complaint appears in the Appendix hereto.

In the first paragraph of the complaint it is alleged that the federal court has jurisdiction under Section 301 of the Labor Management Relations Act of 1947, as amended, (herein referred to as the "LMRA"), 29 U.S.C. §185.

The plaintiff Testers-Inspectors were consistently underpaid as compared with what other Testers-Inspectors were paid. This result is the effect of the establishment in December, 1964, of two groups of Testers-Inspectors:

1. "Day workers, i.e., those working on non-productive work and without incentives", and
2. "Supplementary or meantime workers to whom a supplement of 50¢ is also paid."

The complaint alleges that it was unfair discrimination by both Union and employer which established the two groups of Testers-Inspectors. The same dual grouping of Testers-Inspectors was included in four successive collective bargaining agreements between Western and the Union, namely those of 1964, 1966, 1968 and 1969. Plaintiffs' action was commenced May, 1970, after years of futile attempts to correct the situation by grievances presented to both employer and Union.

Nowhere is it expressly alleged in the complaint that Western violated any of the provisions of the various

collective bargaining agreements therein referred to. Indeed, precisely because the contracts were enforced *as written* plaintiffs below were damaged by the unfair representation during collective bargaining, *in which the employer* initially cooperated. It was that cooperation and unfair representation which produced the unfair contracts of which petitioners complain.

Relief is sought by way of damages for loss of wages, an order requiring the defendants to negotiate wage increases and an order enjoining defendants from further discrimination in the negotiation and application of labor agreements.

Reasons for Granting the Writ

1. In *Vaca* v. *Sipes*, 386 U. S. 171, this Court wrote:

> "It is now well established that as the exclusive bargaining representative of the employees • • • the Union had a statutory duty fairly to represent all those employees, both *in its collective bargaining with the* • • • [employer] • • • and in its enforcement of the *resulting collective bargaining agreement* • • •." (p. 177)
>
> "• • • fair representation duty suits often require review of the substantive positions taken and policies pursued by a union *in its negotiation of a collective bargaining agreement and in its handling of the grievance machinery.*" (emphasis added; p. 181)

This quotation recognizes a duty in the union representative at *three successive stages* of its representation.

(i) The first stage is representation of the involved employees *during the process of bargaining.* Unfair representation can commence or take place entirely during this

first stage. Obviously, if it occurs only *during bargaining*, there cannot be a breach of resultant contract; since during collective bargaining, the eventual contract does not yet exist. The labor contract goes through a process of formulation, provision by the provision,—the first provision being "recognition". Bargaining ends when the *agreement of the bargaining parties* is signified either orally or in writing. But unfair representation could be continued, compounded and memorialized in the resulting labor contract and in its enforcement.

(ii) The second stage begins when, *after* bargaining, agreement (as the end result of bargaining) is reached. That very agreement could be the *locus* of unfair representation. But nothing in the nature of *unfair representation* confines it, temporally, to one or the other of the three stages.

(iii) The third stage, which in some respects is much like a continuation of collective bargaining, is the application or enforcement of the labor contract, usually entailing the handling of grievances.

Unfair representation by the union alone, or by the union in combination or conspiracy with the employer, can infect any of the three sequential stages. But *breach* of contract by definition requires as a condition precedent an *agreement: either* the preliminary recognition agreement *or* the final labor contract *or both*. A theory or rationale of unfair-representation causes is inevitably incomplete, unless it considers (i) all three stages, (ii) both the preliminary recognition agreement and the final labor contract, (iii) the meaning of "recognition" and of "representative", and (iv) the effect of employer collaboration with or implication in the unfair representation.

The cases to-day present an incomplete judicial rationale in these respects; they do not systematically consider and order the foregoing four factors.

Plaintiffs submit that this suit under Sec. 301 LMRA is valid against both Union and Employer, because there was a breach of the preliminary recognition agreement and because the Employer collaborated with the Union's unfair representation.

The usual case, which is well defined by the cases, is a suit against the union for unfair representation and against the employer for breach of the final, written labor agreement. Such a suit is typical of stage 3 described above. For the courts to confine their jurisdiction to *stage 3 cases* is to leave out of the reckoning the instances of unfair representation which occur at stages 1 and 2.

In *Local Union No. 12* v. *N.L.R.B.*, 368 F. 2d 12 (1966) the court suggested that "where the aggrieved employee's claim is not founded on a breach of the bargaining contract, but rather is based squarely upon an alleged violation of the union's duty of fair representation, the unfair labor practice jurisdiction of the Board will apparently be exclusive, totally preempting that of the courts." (p. 22) This dictum cannot be squared with dicta in *Vaca* or with later cases (*infra*).

Be that as it may, it leaves unconsidered the role of *employer cooperation* in the union's unfair representation and the effect of breach of the initial recognition agreement (whether oral or written) which preceded all collective bargaining. This means it also slighted the legal meaning of *representation* and of "representative".

Plaintiffs' theory of their case unpacks the legal implications of the words "representative" and "representatives" as used by the Railway Labor Act (*passim*) and by the LMRA in section 9(a). A similar, if not precisely

identical, dissection of implications from those words was made by this Court in *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U. S. 192. There, as here, it was *compliance* with the underlying labor contract *as written*, not *violation* of its terms, which constituted the unfair representation found by this Court. Nevertheless, in construing Section 1, Sixth, of the Railway Labor Act, this Court wrote:

> "• • • The use of the word, 'representative', • • • plainly implies that the representative is to act on behalf of all the employees which, by virtue of the statute, it undertakes to represent." (p. 199)

> "• • • The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents." (p. 202)

To the same effect see *Tunstall* v. *Brotherhood*, 323 U. S. 210, where the Supreme Court said:

> "We also hold that the right asserted by the petitioner which is derived from the duty imposed by the Railway Labor Act on the Brotherhood, as bargaining representative, is a federal right *implied* from the statute and the policy which it has adopted." (emphasis added; p. 213)

Can anything less be said of the duty of a "representative" (and its implications) under LMRA, even if paragraphs 24 and 26 of the complaint in the instant case are not (as they could be) regarded as claims of breach of contract? It is precisely petitioners' contention that the duties implied from the word, "representative," in

the statute *and in the labor contract* were violated. In other words, as this Court recognized, Congress did not use the word, "representative", as a mere exercise of nominalism. The word in its statutory context has a manifest and intended content or definition which confines it to *fair* as distinguished from *unfair* or *perfunctory* representation. Certainly Congress never intended unfair representation.

2. Since a motion to dismiss a complaint before trial takes the well pleaded allegations as true, the issues raised by the complaint here are of national importance to all employees represented by unions as statutory agents. Their resolution can fill in the gaps of the legal theory to-day supporting unfair representation cases. The Third Circuit's decision concerned a significant question of federal law which has not been, but should be, settled by this Court; and the Third Circuit decided it in a way which conflicts with the dicta of this Court in *Vaca,* as quoted and italicized above. The existence of a serious legal question here is attested by the length of the study given to it by the Third Circuit, which even asked for supplementary Briefs from the parties.

3. The precise questions presented here were never before raised in any other case, so far as petitioners' attorneys have been able to ascertain. The Third Circuit's ruling severely limits and curtails the judicial remedies at the disposal of aggrieved employees confronted by an adversary combination of their employer and their union. At the same time, it expands the area wherein *unfair* representation by a union in combination with the employer may be practiced with impunity.

Remedy by resort to the NLRB is difficult if not altogether impossible as shown by the extremely few cases of unfair representation processed by the Board; and by

the further fact that the Board refuses to issue complaints on such charges unless the aggrieved employee can prove the Union's personal hostility against plaintiffs. In addition, employees experience many difficulties. (*Miranda Fuel Co.*, 140 N.L.R.B. 181, 326 F. 2d 172 (1963)) in involving the employer in an NLRB charge of unfair representation against the statutory agent. Nor is relegation of petitioners to the NLRB possible in view of that Board's statute of limitations. Neither is it consistent with *Vaca* v. *Sipes*, 386 U. S. 171 (1969) and *Motor Coach Employees* v. *Lockridge*, 403 U. S. 274 (1971).

4. Important constitutional issues underlie union shops where, as here, the rights of minority members of a bargaining are suppressed or neglected by the powerful and hostile combination of employer and union, the latter wielding the bludgeon of compulsory unionism.

It was this Court, not legislators or administrative or quasi-judicial agencies, which fashioned the tool of unfair representation cases, in the *Wallace*,* *Steele* (*supra*), *Tunstal* (*supra*), *Vaca* (*supra*) and other cases, according to the opportunities presented by the cases before it. The instant case, it is respectfully submitted presents a new opportunity to expand this relief beyond its present incomplete state.

Therefore, this case presents an important statutory issue which could open up hitherto locked doors for unfair representation suits and which is in itself significant, as a matter of first impression, in relevantly construing Section 301 LMRA and the meaning of "representative" in that Act.

---

* *Wallace Corporation* v. *NLRB*, 323 U. S. 248 (1944).

It seems shockingly wrong to tell these petitioners that they have no remedy and no forum wherein to prove their case.

5. This Court has recognized the aforementioned three stages of the process of collective bargaining (viz.,: (1) recognition and collective bargaining proper; (2) agreement and execution of a contract; and (3) application and enforcement of the labor contract) in any one or more of which unfair representation can and does take place. This means, logically and semantically, that in stages (1) and (2), where breach of the final, written contract is not possible, the allegation of *such* breach is not a possible or reasonable requirement. It is only possible at stage (3). To confine unfair representation cases to breach of *final* labor contract cases is to leave out of reckoning two important areas, *i.e.*, stages (1) and (2), where unfair representation can take place without breach of the final labor contract. But stages (1) and (2) may involve breach of the initial agreement of recognition.

6. Finally, in *Czosek* v. *O'Mara*, 397 U. S. 25; 90 S. Ct. 770 (1970), this Court affirmed the Second Circuit in granting to the "wrongfully discharged" plaintiffs "leave to maintain their action against the railroad [employer] if they should choose to amend their complaint to allege that the employer was somehow implicated in the union's discrimination." (p. 772)

The Court seemed to rule that the employer need only be alleged to have been somehow "implicated" in the union's unfair representation. This is confirmed by the statement in the next page of *Czosek*:

> "The Court of Appeals permitted the railroad to be made a party to the suit if it is properly alleged that the discharge was a consequence of the union's discriminatory conduct or that the employer

was *in any other way implicated in the union's* alleged discriminatory action." (p. 773; emphasis added).

As appears from the complaint, the employer in the instant case *was implicated* in the union's unfair representation by aiding and abetting it in the bargaining process to discriminate against plaintiffs and the class they represent; thus serving its own financial interests.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

October 5, 1972.

Respectfully submitted,

GODFREY P. SCHMIDT
Counsel for Petitioner
786 Broad Street
Newark, New Jersey, 07102

GODFREY P. SCHMIDT

GROSMAN & GROSMAN
786 Broad Street
Newark, New Jersey 07102

APPENDIX

Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Plaintiffs,

vs.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS as President of said Local 1470, and WESTERN ELECTRIC COMPANY INCORPORATED, (KEARNY WORKS),

Defendants

(Civil Action)

Plaintiffs, complaining of defendants, by their attorneys, Grosman & Grosman, respectfully allege:

1. This Court has jurisdiction of this action under Sec. 301, Labor Management Relations Act of 1947, as amended (hereinafter "LMRA.")

2. Plaintiffs are residents and citizens of the State of New Jersey, being domiciled as follows:

(a) Myron Leskiw, 728 Ridge Street, Newark, N. J. 07104;

(b) Sidney Lurinsky, 27 Peach Lane, Oakridge, N. J. 08557;

(c) Donald Washington, 370 Stiles Street, Union, N. J.;

(d) Frank Opalock, 69 Emerald Place, Clark, N. J. 07066;

(e) John Quinn, 602 11th Street, Union City, N. J.

(f) Robert Kostozewski, 18 Ricord Street, Newark, N. J.

3. All plaintiffs are, and for years have been, members in good standing of Local 1470 I.B.E.W., AFL-CIO-CLC (hereinafter "Local 1470").

4. Local 1470 is, and at all of the times hereinafter mentioned was, a "labor organization" under LMRA.

5. Defendant, Anthony Makris, is, and for about five years was President of Local 1470.

6. Defendant, Anthony Makris, is domiciled at 23 O'Brien Court, Bayonne, N. J.

7. Defendant, Local 1470, has its office and principal place of business at 2 Central Avenue, Kearny, N. J.

8. Defendant, Western Electric Company, Incorporated (hereinafter "Western Electric"), is a corporation having its office and place of business in Kearny, N. J.

9. Western Electric is, and long has been, employer of plaintiffs and of the class they represent.

10. Plaintiffs bring this action, pursuant to Rule 23 F.R.C.P., for themselves and for the entire class of "Testers-Inspectors" employed by Western Electric at its Kearny Works.

11. The class represented by plaintiffs is so numerous, comprising some 500 Testers-Inspectors in the involved bargaining unit, that their joinder as parties plaintiff in this action is impracticable.

12. Plaintiffs, as representatives of said class do, and will, fairly and adequately represent and protect the said class.

13. All plaintiffs, those named above and those in the said class are and at all relevant times have been employees of defendant, Western Electric at its Kearny Works, Kearny, New Jersey (hereinafter sometimes called "Employer").

14. Employer is an "employer" within the meaning of LMRA.

15. For many years, Employer and Local 1470 negotiated and signed collective bargaining agreements covering plaintiffs, the class they represent and many other employee-members of Local 1470, totaling some 15,000 employees of Employer.

16. Copies of the current labor contract, executed June 26, 1969, and effective from said date to 11:59 p.m. on

June 25, 1971 are in the possession of the respective parties; and a copy will be available to this Court as needed.

17. All Testers-Inspectors in the said class perform similar and allied work, which consists of inspecting and testing apparatus, devices and modules manufactured or assembled at the aforesaid Kearny Works of Employer.

18. Under a prior supplementary labor contract dated December 12, 1964, between Local 1470 and Employer and beginning in December 1964, Testers-Inspectors (like plaintiffs and the class they represent) were divided by defendants into two groups:

(i) Day Workers, i.e., those working on non-productive work and without incentives;

(ii) Supplementary or meantime workers to whom a supplement of 50¢ is also paid.

19. This two-fold grouping of Testers-Inspectors was continued in each labor contract between Local 1470 and Employer since and including the one negotiated in 1964; namely, in 1964, in 1966, in 1968 and in 1969.

20. The effect of this grouping of Testers-Inspectors by defendants, has been to underpay some Testers-Inspectors by comparison with what Employer pays and is required (by defendants' labor contracts) to pay to other Testers-Inspectors; even though the underpaid Testers-Inspectors perform functions and work identical or practically identical with what the advantaged Testers-Inspectors perform.

21. Another effect of the artificial grouping aforesaid of Testers-Inspectors by defendants has been discrimina-

torily to deprive many Testers-Inspectors of wage increases granted to all other employees, under the Job Grading Agreement between defendants.

22. Still another effect of this artificial grouping of Testers-Inspectors by defendants has been discriminatorily to deprive many Testers-Inspectors of the benefits and advantages of supplements or incentives allowed to most other employees on wage-incentive work.

23. Defendant, Local 1470, and its officers have jointly and severally failed to discharge their respective duties as statutory representatives of the involved Testers-Inspectors (who are members of said Local) in that said defendants, in cooperating with defendant Employer, neglected and arbitrarily disregarded the fair interests of said Testers-Inspectors.

24. Defendants have, in their negotiation and application of the current and past labor contracts, ever since December, 1964, treated Testers-Inspectors with unfair discrimination and virtual hostility, neglecting or disregarding in bad faith and arbitrarily, all their just complaints and grievances.

25. Defendants, while arranging for wage increases for other employees represented by Local 1470, arbitrarily and discriminatorily denied plaintiffs similar wage increases as well as opportunities for wage increases, incentive and supplements. In this way defendants unfairly and unreasonably discriminated against plaintiffs and their class.

26. Defendant Union has been guilty of gross nonfeasance in representing plaintiffs and their class, as well

as hostile discrimination in their arbitrary and capricious refusal to process the just claims and grievances of said plaintiffs and class.

27. Defendant, Local 1470, and its officers have jointly and severally failed in their respective duties as statutory representative of the involved Testers-Inspectors by permitting the aforesaid nonfeasance and discrimination, and by treating them with hostility and arbitrary discrimination.

28. By their conduct aforesaid, defendants treated plaintiffs and the class they represent in an arbitrary unfair, invidious and irrelevant manner in matters concerning plaintiffs' and said class's status as employees.

29. Plaintiffs and said class at all times duly fulfilled the terms and conditions of their employment with Western Electric.

30. By reason of the premises, plaintiffs and the class they represent were grievously damaged during the past six years by loss of earnings in a large amount (exceeding $20,000) whose dollar value can only be ascertained by examinations before trial.

WHEREFORE, plaintiffs demand judgment:

(a) In damages as to loss of wages suffered by plaintiffs and their class because of defendants' aforesaid conduct;

(b) Requiring defendants to negotiate in good faith for wage increases for plaintiffs and the class they represent in an amount fairly comparable with the wages of other related employees for whom, during the past years, wages were discriminatorily increased; and

(c) Enjoining defendants from further discrimination against plaintiffs in the negotiation and application of labor contracts.

GROSMAN & GROSMAN
By ALAN M. GROSMAN
Attorneys for Plaintiffs

Of Counsel:

GODFREY P. SCHMIDT
55 West 42nd Street
New York, N. Y. 10036
212-279-9355

Opinion of United States District Court, District of New Jersey

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Plaintiffs,

vs.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS as President of said Local 1470, and WESTERN ELECTRIC COMPANY INCORPORATED, (KEARNY WORKS),

Defendants

(Civil Action No. 594-70)

Appearances:

GROSMAN & GROSMAN, Esqs.
By: ALAN M. GROSMAN, Esq.
Attorneys for Plaintiffs

GODFREY P. SCHMIDT, Esq. (New York Bar)
Of Counsel

Opinion of United States District Court, District of New Jersey

Cerreto La Penna, Esqs.
By: Jerome J. La Penna, Esq.
Attorneys for Defendants, Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC., Anthony Makris as President of said Local 1470

Pitney, Hardin & Kipp, Esqs.
By: S. Joseph Fortunato, Esq.
Attorneys for Defendant, Western Electric Company, Incorporated, (Kearny Works)

Coolahan, District Judge:

This is a class action brought by six individuals, members of defendant Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC ("Local 1470"). Plaintiffs purportedly represent a class of employees of Western Electric called "Testers-Inspectors". Defendants, in addition to Western Electric, are Local 1470 and Anthony Makris in his capacity as President of said Local.

Plaintiffs bring this action pursuant to Rule 23, Fed. R. Civ. P., for themselves and for a group of Testers-Inspectors employed by Western Electric at its Kearny Works. They allege that the class they represent is so numerous, comprising some five hundred in the involved bargaining unit, that their joinder as parties plaintiff is impracticable. Jurisdiction is allegedly founded under §301 of the Labor Management Relations Act, as amended. 29 U.S.C. §185.

The complaint states that some Testers-Inspectors are underpaid as compared to other Testers-Inspectors even though all employees in this class perform substantially

similar and allied work. As their job title suggests, this work consists of testing and inspecting apparatus, devices and modules manufactured or assembled at the Kearny facilities.

Under a prior supplementary labor contract dated December 12, 1964, between Local 1470 and Western Electric, Testers-Inspectors were divided by defendants into two groups:

1. Day workers, *i.e.*, those working on non-productive work and without incentives;
2. Supplementary or meantime workers to whom a supplement of fifty cents is also paid.

This two-fold grouping was continued in each labor contract between Local 1470 and Western Electric since and including the one negotiated in 1964; namely, in 1964, in 1966, in 1968 and in 1969.

In addition to being underpaid, plaintiffs contend that the effect of this grouping has been to discriminatorily deprive many Testers-Inspectors of wage increases granted to other employees. It is further contended that another effect of this grouping has been to deprive some members of this class of the benefits and advantages of supplements or incentives allowed to most other employees on wage-incentive work.

In distilled essence, plaintiffs charge defendant Local 1470 and its president with unfair representation of the involved Testers-Inspectors. It is alleged that these defendants, in cooperating with defendant Western Electric neglected and arbitrarily disregarded the fair interests of plaintiffs and their class when negotiating said labor contracts.

Relief is sought by way of damages for loss of wages, an order requiring the defendants to negotiate wage increases and an order enjoining defendants from further discrimination in the negotiation and application of labor agreements.

Both defendants have now moved for dismissal on the grounds of lack of jurisdiction over the subject matter. They contend that there has been a failure to allege a violation of the collective bargaining agreement and a failure to exhaust internal union remedies. This court finds the first contention to be dispositive of the motions before it and, therefore, does not find it necessary to consider the second.

Sec. 301 of the Labor Management Relations Act, 29 U.S.C. §185(a) provides as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

The above quoted section states that there must be a violation of the labor contract before this court can acquire jurisdiction. None has been alleged in the instant complaint. Notwithstanding the express statutory language, plaintiffs argue that the case of *Vaca* v. *Sipes*, 386 U. S. 171 (1967), has enlarged that jurisdiction. It is contended in plaintiffs' brief that "the *Vaca* case in part relies on

§301 LMRA, 29 U.S.C. 185, and in part it goes beyond that section into 'traditional' court jurisdiction and judge-made law derived from equitable and logical unpacking of the implications of the idea of statutory representation of employees by unions". It is further argued that a Federal statute is less important than the "common law" of labor relations for the purpose of jurisdiction over this case.

I find these contentions unpersuasive.

The *Vaca* case involved an employee, Owens, who was discharged for poor health upon his return from sick leave. To secure his reinstatement, a griveance was filed and processed through the first four steps of the grievance procedure. During the fourth grievance step the union sent the employee to a physician for a more complete examination. The report was unfavorable to the employee and the union decided not to take the grievance to arbitration. Owens instituted suit against the union in a state court of Missouri. He alleged that the union had "arbitrarily, capriciously and without just or reasonable reason or cause" refused to take his grievance to arbitration under the bargaining agreement's greivance procedures.

A jury awarded Owens $7000 compensatory damages and $3300 punitive damages. After the trial judge had set the verdict aside on the ground that the National Labor Relations Board had exclusive jurisdiction of the controversy, the Supreme Court of Missouri reversed and reinstated the verdict.

The United States Supreme Court held that the NLRB did not have exclusive jurisdiction over this controversy, and that the preemption doctrine does not apply to the

alleged breach of the union's duty of fair representation. It held further, that an individual employee may recover against his employer in an action under §301 where the employer repudiates the contractual provisions for grievance settlement. Recovery was also said to be permissible where the union has failed, in bad faith, or through arbitrary or discriminatory conduct to properly represent the employee by processing his grievance under the contract for procedure.

Unlike the instant case, however, the *Vaca* case did involve a breach of contract. Plaintiffs, it seems, would have this court read *Vaca* in a much broader context, *i.e.*, to extend §301 jurisdiction to alleged unfair conduct in the *negotiation* of labor contracts in addition to suits for their violation. This court finds that neither *Vaca* nor its progeny authorizes such an extension of our jurisdiction.

Admittedly, the majority opinion in *Vaca* contains some discussion by way of dicta concerning employee rights to judicial cognizance of suits for alleged unfair representation. Nowhere, however, does this court find authority in the case for the proposition that §301 suits may be maintained for alleged unfair representation without any allegation of a concurrent breach of contract. Cases cited by plaintiffs to this end are easily distinguished as cases arising under the Railway Labor Act and not §301 of LMRA, *e.g.*, *Czosek* v. *O'Mara*, 397 U.S. 25 (1970); *Steele* v. *L. & N.R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944).

Many cases have held that §301 should not be given a narrow reading in view of the congressional intention to have the administration of collective bargaining contracts accomplished under a uniform body of substantive law.

Smith v. *Evening News Assoc.*, 371 U.S. 195 (1962); *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957); *Chasis* v. *Progress Mfg. Co.*, 382 F. 2d 773 (3rd Cir. 1967). Congress, however, in enacting this section expressly required a breach of a labor contract as a prerequisite to jurisdiction by a Federal district court. *Palnau* v. *Detroit Edison Co.*, 301 F. 2d 702 (6th Cir. 1962). Further, in enacting the Labor Management Relations Act, Congress knowingly set up a system in which to some extent the interests of particular individuals may be subordinated to the interests of the group both at the contract negotiation stage and thereafter. See *Acuff* v. *United Papermakers and Paperworkers*, 404 F. 2d 169, 171 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969).

The policy of §301 is to promote industrial peace by making collective bargaining agreements enforceable in district court. *Textile Workers Union* v. *Lincoln Mills, supra; Retail Clerks Union, Local 122, AFL-CIO* v. *Alfred M. Lewis, Inc.*, 327 F. 2d 442 (9th Cir. 1964). Plaintiffs would have this court employ §301 for an opposite policy, *i.e.*, to prevent enforcement of the express terms of such agreements.

The allegations of the complaint in the instant case closely parallel those set forth in the opinion of Judge Kalodner in *Adams* v. *Budd Company*, 349 F. 2d 368 (3rd Cir. 1965). In affirming the trial court's dismissal of a §301 complaint, the court observed:

> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire'". 349 F. 2d at 370.

Though this case was decided prior to *Vaca* v. *Sipes*, *supra*, I find nothing in my reading of *Vaca* which would modify the result.

Mr. Justice Fortas, in his concurring opinion in *Vaca*, expressly recognized that the Court's majority opinion still required a §301 suit to be couched in breach of contract terms. He states:

> "The Court's difficulty, it seems to me, reflects the basic awkwardness of its position: It is attempting to force into the posture of a contract violation an alleged default of the union which is not a violation of the collective bargaining agreement but a breach of its separate and basic duty fairly to represent all employees in the unit." 386 U.S. at 201.

Finally, and perhaps most importantly, one must inquire as to the potential consequences should suits like this be allowed to be maintained. Surely the salutary objectives of §301 would not be fostered. Every dissident faction of union members would be able to bring suit in district court by simply alleging unfair representation should they find themselves dissatisfied with the bargain struck by their lawfully elected representatives. This is not to suggest that relief should not be available for legitimate grievances of this kind; relief is available, but under the auspices of the National Labor Relations Board pursuant to an unfair labor practice complaint. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962);* *Local 12, United Rubber*

---

* The decision of the NLRB was denied enforcement by the Court of Appeals for the Second Circuit but on a basis which did not decide the point relevant here. Only one Judge, Judge Medina, took the position that the NLRB was incorrect in holding that the violation of the duty of fair representation was an unfair labor practice.

Workers v. *NLRB*, 368 F. 2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), *rehearing denied*, 389 U.S. 1060 (1968). Under the preemption doctrine defined in *Santiago Building Trade Council* v. *Garmon*, 359 U.S. 236 (1959), the NLRB has exclusive jurisdiction over allegations such as those in the instant complaint where no concurrent breach of contract exists.

Defendants' motions for dismissal of the complaint must prevail. Let appropriate orders in conformity with the views herein expressed be presented.

Final Judgment of Said District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION 594-70

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN, and ROBERT KOWTOZEWSKI,

Plaintiffs,

vs.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS, as President of said Local 1470, and WESTERN ELECTRIC COMPANY, INCORPORATED, (KEARNY WORKS)

Defendants.

This matter having been opened to the Court on Monday, September 28, 1970, before the Honorable James A. Coolahan, on Motion to Dismiss the Complaint, by Pitney, Hardin & Kipp (S. Joseph Fortunato, Esquire, appearing), attorneys for defendant Western Electrical Company, Incorporated, and on Motion to Dismiss the Complaint by Cerreto & LaPenna (Jerome J. LaPenna, Esquire, appearing), attorneys for defendants Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC, and Anthony Makris as President of said Local 1470, and in the presence of Grossman & Grossman (Allan

M. Grossman, Esquire, appearing) attorneys for plaintiffs Myron Leskiw, Sidney Lurinsky, Donald Washington, Frank Opalock, John Quinn, and Robert Kowtozewski, and Godfrey P. Schmidt, Esquire, of counsel to attorneys for plaintiffs, and the Court having considered the Complaint and the briefs in support and opposition to the aforesaid Motions and having heard the oral arguments of counsel for all parties, and the Court having rendered and filed its written opinion on October 28, 1970;

IT IS, on this 17th day of November, 1970,

ORDERED that:

1. The Motions of all defendants to Dismiss the Complaint be and the same are hereby granted; and

2. Final Judgment be and the same is hereby entered dismissing the Complaint, without costs to any party as against any other party.

/s/ JAMES A. COOLAHAN,
U.S.D.J.

Consent as to form.

GROSSMAN & GROSSMAN
Attorneys for Plaintiffs
By ALLAN M. GROSSMAN

Opinion of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 71-1077

MYRON LESKIW, SIDNEY LURINSKY, DONALD WASHINGTON, FRANK OPALOCK, JOHN QUINN and ROBERT KOWTOZEWSKI,

Appellants,

v.

LOCAL 1470, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO-CLC., ANTHONY MAKRIS, as President of said Local 1470, and WESTERN ELECTRIC COMPANY, INCORPORATED, (KEARNY WORKS).

(D. C. CIVIL ACTION No. 594-70)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued January 5, 1972

Before KALODNER, GANEY* and ROSENN,
Circuit Judges

*Judge Ganey participated in the argument and disposition of this case but died before this opinion was filed.

Opinion of the United States Court of Appeals for the Third Circuit

OPINION OF THE COURT

(Filed July 7, 1972)

KALODNER, *Circuit Judge.*

The six plaintiffs, members of the defendant Local 1470, International Brotherhood of Electrical Workers, AFL-CIO-CLC, are employed as Testers-Inspectors[1] by the defendant Western Electric Company, Incorporated (Kearny Works).

Asserting existence of federal jurisdiction under Section 301(a) of the Labor-Management Relations Act of 1947, as amended,[2] they brought this action in the court below in May 1970. In their Complaint they allege, in sum, that (1) they represent a class of Western Electric employees called Testers-Inspectors; (2) the current 1969 Local 1470—Western Electric collective bargaining agreement, as well as its three predecessors since 1964, arbitrarily and unjustifiably divides Testers-Inspectors into

---

[1] Testers-Inspectors inspect and test products manufactured and assembled by Western Electric Company.

[2] 29 U.S.C.A. Section 185(a)

Section 301(a) provides:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

two classifications with consequent loss of wages to some of them; and (3) Local 1470, and its president, the defendant Anthony Makris, in negotiating the current collective bargaining agreement and its predecessors, "failed to discharge their respective duties as statutory representatives of the involved Testers-Inspectors . . . in that they . . . in cooperating with defendant Employer, neglected and arbitrarily disregarded the fair interests of said Testers-Inspectors."

Plaintiffs, in their Complaint, sought the following specified relief—(1) damages for loss of wages; (2) a judgment "[r]equiring defendants *to negotiate* in good faith for wage increases for plaintiffs and the class they represent in an amount fairly comparable with the wages of other related employees for whom, during the past years, wages were discriminatingly increased"; and (3) an order "[e]*njoining the defendants from further discrimination against plaintiffs in the negotiation and application* of labor contracts." (emphasis supplied).

The defendants moved to dismiss the Complaint on these grounds: (1) lack of jurisdiction under Section 301(a) because the Complaint did not allege violation of the collective bargaining agreement on the part of the defendants; and (2) the plaintiffs had failed to exhaust available union remedies.

The District Court granted the dismissal motions on the first ground. In its Opinion accompanying its "Final Judgment" of dismissal, it held that under Section 301(a) ". . . there must be a violation of the labor contract before this court can acquire jurisdiction," and "[n]one has been alleged in the instant Complaint." The District Court further stated:

> "*Congress . . . in enacting this section expressly required a breach of a labor contract as a prerequisite to jurisdiction by a Federal district court.* Palnau v. *Detroit Edison Co.*, 301 F. 2d 702 (6th Cir. 1962). Further, in enacting the Labor Management Relations Acts, Congress knowingly set up a system in which to some extent the interests of particular individuals may be subordinated to the interests of the group both at the contract negotiation stage and thereafter. See *Acuff* v. *United Papermakers and Papersworkers*, 404 F. 2d 169, 171 (5th Cir. 1968), *cert. denied*, 394 U.S. 987 (1969)." (emphasis supplied).

The District Court cited in support of its stated holding *Adams* v. *Budd Company*, 349 F. 2d 368 (3 Cir. 1965), where we ruled to the same effect. It rejected the plaintiff's contention that *Vaca* v. *Sipes*, 386 U.S. 171 (1967), later decided, had otherwise construed Section 301(a) and enlarged its jurisdiction to encompass an action which did not allege or involve violation of a collective bargaining agreement. The District Court noted that *Vaca did* involve a breach of the collective bargaining agreement.

We agree in every respect with the District Court's disposition, and its holding that "[t]he allegations of the complaint in the instant case closely parallel those set forth" in *Adams*.

In *Adams*, the plaintiffs, who were employees of the defendant, The Budd Company, and members of the defendant Union, alleged in their complaint that Budd and the Union, "collusively" and "in bad faith," conspired to deprive them of a "super-seniority" status which they had

acquired under their "original contract of hire" and earlier labor contracts, in negotiating a new collective bargaining agreement. The complaint did *not* allege a breach of the agreement itself. Noting that diversity jurisdiction did not exist, we found that the critical question presented was whether federal jurisdiction in such an action existed under Section 301(a).

In doing so we said at 349 F. 2d 369-370:

> "The plaintiffs seem to be oblivious of the fact that Section 301(a) only creates federal jurisdiction, in the absence of diversity of citizenship, with respect to '[*s*]*uits for violation of contracts* between an employer and a labor organization . . . or between any such labor organizations.' (emphasis supplied). [footnote omitted].
>
> "Here the plaintiffs do not seek redress for violation *of* a collective bargaining agreement; what they seek is redress for an alleged violation *by* a labor contract of rights which they assert were independently, and pre-agreement, vested in them by their 'contract of hire.'
>
> "We are of the opinion that Section 301(a) did not confer jurisdiction upon the District Court to entertain this action and that it should have dismissed it for that reason.
>
> . . . .
>
> "In the instant case there is no complaint or contention that Budd and Union violated a provision of a collective bargaining agreement."

In the instant case, as in *Adams*, there is no diversity of citizenship since all the parties are citizens of the State

of New Jersey. Also, as in *Adams*, there is no allegation or contention here that the collective bargaining agreement was violated. As the District Court stated "[i]n distilled essence, plaintiffs charge defendants Local 1470 and its president with unfair representation of the involved Testers-Inspectors," and that they "in cooperating with defendant Western Electric, neglected and arbitrarily disregarded the fair interests of plaintiffs and their class when negotiating said labor contracts."

What has been said is dispositive of the critical issue presented by this appeal.

The Final Judgment of the District Court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.